The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Interwaste Services Company

File: B-224407

Date: October 2, 1986

DIGEST

Agency reasonably determined that the protester was not responsible where, although some of the reasons cited by the agency might not support a nonresponsibility determination, the record indicates that the protester's parent corporation had experienced performance problems under prior contracts with the agency and that the protester would rely on the resources of its parent in performing its contract.

DECISION

Interwaste Services Company (ISCO) protests the determination of the Defense Reutilization & Marketing Service (DRMS) that ISCO was nonresponsible under request for proposals (RFP) No. DLA200-85-R-0043. We deny the protest.

BACKGROUND

The solicitation sought a contractor to provide all necessary services for the pick-up, transportation and disposal of various estimated quantities of hazardous wastes generated at a number of Department of Defense installations in Hawaii. The schedule contained 133 line items consisting of both polychlorinated biphenyls (PCBs) and non-PCBs. Offerors could submit proposals on all items or on either the PCBs or the non-PCBs alone. ISCO submitted a proposal on the non-PCB items. The contracting officer referred the proposals to a technical evaluation committee (TEC) on January 6,1986. On February 7, the contracting officer

requested the Defense Contract Administration Services Management Area (DCASMA), Seattle, Washington, to conduct a preaward survey on ISCO.[1]/

The contracting officer received the technical evaluation report on March 14. The report identified a number of technical deficiencies in ISCO's proposal. The TEC's ratings of the proposal, however, were all either "A" (acceptable) or "RS" (reasonably susceptible of being made acceptable) and the contracting officer determined that the proposal therefore should be in the competitive range.

On March 17, the contracting officer received DCASMA's preaward survey report, which recommended that award not be made to ISCO. The report noted that ISCO had no equipment or facilities to pick up, package, transport, or dispose of hazardous waste and would have to rely on subcontractors to perform these functions. The report also cited the need for ISCO to hire three additional people and said that ISCO's plan to find such personnel by placing newspaper advertisements and recruiting at community colleges was unsatisfactory. The report further noted that ISCO previously had done business with only one of its proposed subcontractors, that its operations manual did not contain disposal methods, and that although ISCO had an in-house training program, none of its employees had been "certified." Finally, the report stated that there was a lack of prudent record keeping on the part of ISCO with respect to the packaging and transportation regulations of the Environmental Protection Agency (EPA). On May 1, the contracting officer determined that ISCO was not responsible, based largely on the conclusions contained in the DACSMA report.

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[1]/ The agency report acknowledges that ordinarily a preaward survey is not requested until after the evaluation of proposals, but explains that the request was made early in this case because of the need to proceed with the procurement expeditiously and because ISCO had been created only recently and thus was not known to the contracting officer. Once bids or proposals have been received, an agency is not precluded from requesting a preaward survey before the evaluation of bids or proposals is complete. See Security Assistance Forces & Equipment International, Inc., B-194876, May 5, 1980, 80-1 CPD ¶ 320.

The agency reports that it did not immediately advise ISCO of the nonresponsibility determination. Rather, the contracting officer sought additional information on ISCO's parent company, Nuclear Support Services, Inc. (NSSI). ISCO had stated in its proposal that it was a subsidiary corporation of NSSI, and the firm had provided DCASMA with a consolidated financial statement for use in the preaward survey.

On June 16, the contracting officer received a memorandum from the DRMS Directorate of Environmental Protection indicating that NSSI had "major compliance deficiencies" under three prior hazardous waste disposal contracts with DRMS. The memorandum stated that NSSI had arranged for disposal of hazardous waste at sites that had not received a treatment, storage, and disposal facility (TSDF) designation under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. (1982), and had delivered to TSDF sites types of hazardous waste the sites were not allowed to accept. The memorandum also alluded to the issuance of numerous show cause notices for late performance under these three contracts and stated that NSSI had billed the government for disposal of waste that actually was still in storage.

In addition, the contracting officer learned that DCASMA had issued a negative preaward survey report on NSSI with respect to a recent solicitation for hazardous waste disposal for installations in Guam. The report cited poor performance by NSSI on prior contracts and noted that one of the disposal sites that NSSI had proposed to use said that its capacity might not be sufficient and that another proposed site said that its facility would not be available to NSSI at all. (In ISCO's proposal it had proposed using the same two sites.) The report also referred to statements made by NSSI's operations manager (who was also listed as operations manager in ISCO's proposal) that the two companies were one and the same. At another point, the report said that company officials planned to change the name of NSSI to ISCO if NSSI received a contract under that solicitation.

Based on the June 16 memorandum and the DCASMA report on NSSI, the contracting officer made a second nonresponsibility determination with respect to ISCO. The agency informed ISCO of that determination and also informed the firm that the agency had determined that its proposal was technically unacceptable. ISCO then protested to this Office.

The protester contends that the nonresponsibility determination was unreasonable. The protester lists six contracts that it says NSSI and ISCO have performed successfully within the past 3 years and notes that neither firm ever has been defaulted under a government contract or been suspended or debarred. The protester acknowledges that the agency issued several show cause letters to NSSI under prior contracts, but explains that the delays experienced under those contracts occurred because the EPA had seized NSSI's records in July 1985 in connection with an investigation. That investigation continues, but no criminal or civil charges have been filed against either NSSI or ISCO as a result of it, says the protester. ISCO contends that the existence of the EPA investigation may be the real reason for the agency's nonresponsibility determination.

The protester has addressed each of the grounds upon which the contracting officer based his finding that ISCO was not responsible. Specifically, the protester argues that the solicitation did not prohibit or limit the use of subcontractors in performing the contract. ISCO contends that because the installations to be serviced under the contract are located in Hawaii, where apparently there are few disposal sites, extensive use of transportation and disposal subcontractors will be required regardless of the firm selected as the prime contractor. With respect to personnel, ISCO contends that the preaward survey team improperly focused on the plans for making three additional hires while ignoring the firm's large, existing staff and its access to NSSI's considerably larger staff. The criticism that the firm's in-house training program does not produce "certified" employees is unwarranted, says ISCO, because there is no requirement in the solicitation or otherwise for an employee certification program. The reason that its operations manual did not contain disposal methods, explains ISCO, is simply that the firm is not a disposal facility and has no in-house disposal capability.

Concerning record keeping, ISCO contends the applicable regulations do not require it to maintain records of employee training. In addition, ISCO states that the preaward survey team did not even ask to examine the firm's shipping manifests, which the protester says it maintains in full compliance with the regulations.

Finally, ISCO objects to the findings contained in the preaward survey of NSSI with respect to the Guam procurement. As indicated, the contracting officer relied on those

findings in determining that ISCO was nonresponsible for purposes of the Hawaii procurement. ISCO argues that the findings are based merely on show cause orders that the agency had issued to NSSI under prior contracts and that in each instance the agency had found NSSI's explanations to be acceptable. ISCO has provided us with copies of correspondence between NSSI and the agency that it says supports its position.

ANALYSIS

The contracting officer's report clearly indicates that although ISCO's technical proposal was deficient in some respects, the proposal was capable of being made acceptable. The report indicates further that the sole reason for discontinuing consideration of the proposal was the determination that ISCO was not responsible, despite the reference in the agency's letter to ISCO that its proposal was technically unacceptable. We need not consider, therefore, the propriety of the agency's technical evaluation since it was on responsibility rather than technical grounds that the agency rejected ISCO's proposal.

The regulations provide that before any contract may be awarded, the contracting officer must affirmatively determine that the prospective contractor is responsible. Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(b) (1985). A contracting officer has broad discretion in this regard since a responsibility determination primarily involves the exercise of sound business judgment. Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 CPD ¶ 252. For this reason, our Office will not question a contracting officer's nonresponsibility determination unless the protester demonstrates that the determination was made in bad faith or that it lacks a reasonable basis. Decker and Co., et al., B-220807, et al., Jan. 28, 1986, 86-1 CPD ¶ 100. The protester in this case has not alleged bad faith on the part of the agency, and we believe that, on balance, the agency's determination of nonresponsibility was reasonable.

We agree with the protester that some of the concerns cited by the agency do not support a finding that ISCO was not a responsible prospective contractor. For example, the contracting officer noted that ISCO did not appear to have in-house transportation and disposal facilities, but did not explain why he believed this might impair ISCO's ability to perform the contract. Moreover, as requested by the solicitation, ISCO's proposal contained detailed lists of proposed transporters and disposal sites and we find nothing

in the solicitation that would preclude ISCO from subcontracting these tasks as well as others. In the absence of such a provision, a contractor is free to use subcontractors in the performance of a government contract. Harris Systems of Texas, Inc., et al., B-208670, et al., Apr. 13, 1983, 83-1 CPD ¶ 392.

Similarly, we do not believe that criticism of ISCO's hiring plan or the lack of "certification " of its personnel when the solicitation had no such requirement would support a nonresponsibility determination. In fact, had the agency's nonresponsibility determination been based solely on the conclusions contained in the DCASMA preaward survey report regarding the subject solicitation, the agency's determination would be questionable. As we read the record, however, the primary basis for the determination was the agency's less than satisfactory experience under prior contracts with ISCO's parent corporation, NSSI. When this experience is considered, the agency's determination has a reasonable basis.

The regulations provide that affiliated concerns (for example, parent and subsidiary corporations) normally are considered separate entities for purposes of determining whether the concern that is to perform the contract is responsible. FAR, 48 C.F.R. § 9.104-3(d). A contracting officer must consider an affiliate's past performance and integrity, however, when they may adversely affect the prospective contractor's responsibility. Id. In this case, it appeared to the contracting officer that the relationship between ISCO and NSSI was close. In fact, the contracting officer suggested in the request for the preaward survey that there may not have been two separate firms, but rather only one firm that simply had changed its name. There are numerous references to NSSI in ISCO's proposal, and in its protest to this Office ISCO has promoted rather than discouraged the notion that the two firms are very much the same. In short, we think the contracting officer was justified in weighing the agency's prior experience with NSSI in determining whether ISCO was responsible.

The information available to the contracting officer indicated that NSSI had experienced delivery problems under prior contracts. These problems involved both late deliveries and deliveries to inappropriate disposal sites. Although the protester claims that NSSI explained these problems to the agency's satisfaction, this claim is not supported by the record before us.

The alleged performance deficiencies are detailed in an intra-agency memorandum dated June 16, which cites three NSSI contracts and describes the performance problems encountered. The protester has sought to counter the allegations of deficient performance by providing us with a copy of a letter from the agency to NSSI threatening to terminate one of these contracts for failure to perform two delivery orders issued under that contract in a timely manner. The protester also provided us with a copy of NSSI's response to the show cause letter and notes that the agency never terminated any of NSSI's contracts. NSSI's letter references several other items of correspondence between it and the agency which ISCO did not make part of the protest record. The protester provided no specific information concerning the other two contracts mentioned in the June 16 memorandum.

Based on the record before us, we are not in a position to resolve the dispute between the agency and NSSI over the extent to which the firm performed its prior contracts with the agency in compliance with their terms. What is clear from the record, however, is that NSSI's performance failed to satisfy the agency's expectations. The agency has alleged that numerous deliveries under the three contracts were delinquent and the protester has not contended otherwise. The protester attempts to explain the deliquencies by citing the EPA's seizure of its records, but we can hardly fault the agency for failing to find reassurance in this explanation. Although the agency may not have defaulted NSSI for its delinquent deliveries, we do not think that the absence of a default termination should be construed as indicating that the agency was satisfied with the contractor's performance. Unsatisfactory and untimely performance under prior contracts may provide a reasonable basis for a nonresponsibility determination. C.W. Girard, C.M., B-216004, Dec. 26, 1984, 84-2 CPD ¶ 704.

A contracting officer enjoys considerable discretion in making a responsibility determination since it is he who must bear the brunt of any difficulties experienced during contract performance. Martin Electronics, Inc., B-221298, supra. In this case, based on the close relationship between the protester and its parent, and the difficulties experienced by the agency in obtaining timely and satisfactory performance from the parent, we conclude that the contracting officer did not act unreasonably in determining that the protester was not responsible.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel